

*United States Court of Appeals  
for the  
District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



927

No. 23,341

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT MILLER,

Appellant.

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APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF COLUMBIA

BRIEF FOR APPELLANT

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United States Court of Appeals  
for the District of Columbia Circuit

MAR 13 1971

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,341

Criminal 1582-68

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT MILLER,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW \*

1. Whether Congress intended under 26 U.S.C. 4704(a) and 21 U.S.C. 174 to make criminal the possession of narcotics by an addict.

2. Whether the conviction of a narcotics addict and his sentencing to ten years' imprisonment for the possession of narcotics constitutes cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States and a violation of due process under the Fifth Amendment of said Constitution.

3. Whether probable cause existed for the arrest of individuals without an arrest warrant upon the observation of an exchange of money and a glassine package apparently containing white capsules.

STATEMENT OF THE CASE

Appellant and another man were arrested by police officers without a warrant upon observation of the exchange of a glassine envelope apparently containing capsules with a white powder, and after a search, appellant was charged with possession of ten capsules of heroin found

\* The pending case was never before this Court under any title.

in the pocket of the raincoat he was wearing. He was indicted for violation of 26 U.S.C. 4704(a), the Harrison Narcotics Drug Act, and of 21 U.S.C. 174, the Jones-Miller Act. At trial the court instructed the jury that the crux of the case under both counts was whether the appellant had possession of the narcotics (Tr. 78). The jury found appellant guilty on both counts, and the court sentenced him to ten years' imprisonment. Appellant filed timely notice of appeal, and thereafter a motion for remand, which motion was granted by this Court for consideration of resentencing under the Narcotics Rehabilitation Act of 1966. Appellant was sent to the Federal Prison at Danbury, Connecticut, and based on the report of that institution that appellant was an addict and could only be helped by methadone treatment and individual therapy which could not be provided under the federal prison system, the court below recommitted him for the purpose of continuing to serve the sentence previously imposed.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS

##### Amendment Eight to the Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

##### Amendment Five to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

##### Title 21, United States Code, Section 174 (Jones-Miller Act):

Whoever fraudulently or knowingly imports or brings any narcotic

drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such acts in violation of the laws of the United States, shall be imprisoned not less than five nor more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954) the offender shall be imprisoned not less than ten nor more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for the violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession of the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, section 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, section 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, sections 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, section 105, 70 Stat. 570.

Title 26, United States Code, Section 4704(a) (Harrison Narcotic Drug Act):

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same shall be found.

ARGUMENT

1. Congress never intended that possession of narcotics alone on the part of an addict should constitute a crime.

The Court's attention is directed to the supplemental record on remand docketed on February 19, 1971 herein, which contains the report of the Federal Correctional Institution at Danbury based on a study pursuant to Title 18, Section 4252, of the United States Code, being Title II of the Narcotic Addict Rehabilitation Act of 1966.

This report, by the Director of the Narcotic Addict Rehabilitation Unit, who is a medical doctor, points out that appellant is an addict and

has been using drugs since approximately 1950, and that he realistically believes that group treatment as available under the NARA program would not help him, and that the program would not benefit him. The Director goes further to express the hope that some other resource may be found, apparently not available in the federal program, whereby appellant can attempt methadone treatment and individual therapy, for which he is a good candidate. The important conclusions to be drawn are (1) that appellant can be helped, and (2) such help is not available in the federal prison system.

Under these circumstances, the question is posed as to whether appellant should be kept in prison for ten years for a medically shown addiction where he cannot be rehabilitated, and will probably be returned to society less well able to adjust than now.

Legally, this leads to the question of whether Congress intended that simply on proof of possession of narcotics, a man should be incarcerated for this period of time, as required under the statutory provisions. As a practical matter, the crimes of which appellant was convicted are generally referred to as "possession", as indicated in the memorandum of the court below filed February 10, 1971. Although the indictment runs the gamut of the statutory language, the prosecution emphasized possession as the proof to be made (Tr. 13), and in closing referred to the issue as that of possession (Tr. 64). The trial court, after giving the jury the terms of the statutes, said:

"The crux of this whole case, ladies and gentlemen of the jury, insofar as both counts are concerned, is whether or not the defendant had possession of a narcotic drug." (Tr. 78)

It is true that possession, under the statutes, creates a

presumption which, standing alone, is sufficient to convict, but this does not mean that the entire case is directed to possession, as was done here. The crime is not possession, but possession combined with the other elements.

One consideration here is the extent of the federal scope of control. If the intent of Congress in enacting the Jones-Miller Act in 1909 and the Harrison Narcotic Drug Act in 1914 intended to control addiction (which was found not to be the case in the opinion of this Court in the Watson case (slip op., page 18), then under the Robinson opinion of the Supreme Court (370 U.S. 660), holding that the States have authority in this area, a Constitutional issue of permissible federal legislation in this area might well be raised. However, as brought out in Watson, there was even some doubt as to the commerce power justification, so that the tax authority was used as the basis for the later legislation. However, extreme mandatory minimum sentences were attached, and if the legislation is to be found Constitutional, it would seem that a very limited reading must be given to these two statutes.

Although by their terms, purchasing may be considered sufficient involvement for conviction, it is submitted that it is the trafficking that provides the real basis for conviction, and that the statute can be read as indicating that a showing of dealing on other than a personal use basis is required. Admittedly, the statutory language and the legislative history provide no help in this direction, but if the statutes are to be found Constitutional, which should be the effort of the Court, this is the

only way, it is respectfully submitted, that this can be done. If the presumption based on possession can be converted into the act constituting the crime, the statutes must fall, as will be shown below.

2. The criminal provisions of the Jones-Miller Act and Harrison Narcotics Drug Act are unconstitutional under the Eighth and Fifth Amendments to the Constitution of the United States.

Here again the Court's attention is directed to the supplemental record on remand docketed on February 19, 1971, indicating appellant's addiction and inability to obtain the assistance he requires under the NARA program.

Assuming that it must be found that Congress intended that anyone possessing narcotics who cannot show affirmatively that taxes were paid on them when imported or he received them on prescription is guilty and must serve lengthy terms in prison, the conclusion is unescapable that the statutes cannot withstand Constitutional attack.

The Supreme Court in the Robinson case invalidated a state statute found to be within the police power available to the State on the subject of addict control, which did not approach the seriousness of the presently considered statutes. As stated in the previous section, a substantial question exists as to whether Congress in a tax measure can properly enact a statute which can be used as the basis for broad exercise of regulatory jurisdiction of this type. Actually, these two statutes are the basis for the regulation of narcotic use and addiction, a result beyond any tax administration program.

Second, the very serious question exists as to whether an addict

who purchases drugs for his own personal needs can be convicted and sentenced, not for ninety days as in Robinson, but for ten years, as here, when no rehabilitation is possible during that time, even assuming such rehabilitation is a basis for the exercise of federal regulatory power in this area. As Justice Stewart said in Robinson:

"But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.: (p. 666)

The difference in the two cases is that the California statute in Robinson punished addiction, without any requirement that there be any proof of narcotics use in the state, while the federal statute punishes the possession of untaxed drugs without consideration of addiction. The Supreme Court in the earlier case of United States v. Jin Fuey Moy, 241 U.S. 394 (1916) held that the presumption of the Harrison Act did not apply in the case of a small amount for personal use. In the present case, only ten capsules were involved, an amount which is certainly within personal use needs, and it is difficult to see how the courts could in the many cases of this type have avoided the rationale to be drawn from the holding in that case.

The opinions of the Supreme Court in the Robinson case, and of this Court in the Watson and Kleinbart cases, go very thoroughly into the medical and sociological aspects of the addiction problem. Suffice it to summarize at this point that narcotics addiction is a serious problem facing our society, and one which cannot be handled through criminal prosecutions where facilities for treatment of addicts is not available as here, and such prosecutions are not limited to traffickers, but meted out to users as well. Cf. United States v.

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Ashton, W.L.R. 1869, the recent decision of the court below on this subject.

The Robinson case also covered the Fourteenth Amendment aspect of this problem. Assuming that these statutes fall within the limited class of criminal provisions where felonious intent does not have to be proven, or can be presumed from the doing of the act itself, they entail an even greater responsibility, as indicated in Speiser v. Randall, 357 U.S. 513, 523, where the following was said:

"When one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Tot v. United States /319 U.S. 463/ . . . 'The power to create presumptions is not a means to escape from constitutional restrictions.' Bailey v. Alabama, 219 U.S. 219, 239."

Thus we have a Fifth Amendment due process question as well as one under the Eighth Amendment prohibition against cruel and unusual punishment. In either case, to punish a man by a ten year sentence for possessing ten capsules of narcotics without any proof that he is a dealer in narcotics, when the court is aware of his addiction even before trial, and no evidence of any further involvement than as a user is presented, is, it is respectfully submitted in the words of Oliver Wendell Holmes, Jr., too severe for a community to bear. See The Common Law, Oliver Wendell Holmes, Jr. (1881), page 50. See transcript of pretrial proceedings, pages 5-7.

3. Probable cause did not exist for the arrest of the appellant without a warrant and a search of his clothing which produced the narcotics on the basis of which he was charged.

The Court's attention is directed to pages 5, 15, 26, 28, 30, 33, 34, 39 and 40 of the Transcript of proceedings on the pretrial motion, and pages 19, 20, and 44 of the Transcript of trial.

The issue here was set forth by the Court in Hinton v. United States, 137 U. S. App. D. C. 388, 424 F. 2d 876 (1969), in the following terms:

"The problem here is one of probable cause for appellant's arrest, a requirement that mediates between the personal right to security from arbitrary intrusions by the police and the practical need to allow police officers reasonable play for their experience in judging actions and situations signalling the commission of a crime. And within these bounds, the elements of finding a probable cause are as varied as encounters between citizens and police, seldom does a decision in one case handily dispose of the next."

Courts must scrutinize more closely the testimony in cases involving warrantless arrests and searches than in cases involving those based on warrants. Rouse v. United States, 359 F. 2d 1014, 123 U. S. App. D. C. 348 (1966). If evidence is discovered by search, its admissibility turns on whether the search was lawful, that is, reasonable in the circumstances. Vauss v. United States, 125 U. S. App. D. C. 228, 370 F. 2d 250 (1966).

In the present case appellant was arrested on the street without a warrant. The arresting officers testified that appellant and a companion were observed on the sidewalk "acting in a very suspicious manner, looking around, looking behind them, looking over to the side" (Pretrial Tr. 28, 40, Tr. 19, 29). They were not drunk,

not disorderly (Tr. 44). It is established that suspicion or even strong reason to suspect is not sufficient to support an arrest.

Henry v. United States, 361 U.S. 98 (1960). In White v. United States, 106 U. S. App. D. C. 246, 271 F. 2d 829 (1959), a police officer observed the defendant walking in company with another, continually looking back over his shoulder. The officer stopped both men and requested identification, and defendant's statements conflicted with his identification. He also admitted not having a job and living from his gambling earnings. The officer arrested him for vagrancy. This Court held there to be no probable cause, in the absence of an outcry or report of a felony or misdemeanor having been committed.

Among the several sorts of fact, experience and supposition which in some combination have been held to support probable cause for arrest without warrant in this jurisdiction, the present case is distinguished by the fact that appellant and his companion were entirely unknown to the arresting officers (Pretrial Tr. 35, Tr. 20). The officers had never seen them before and had no information on them by informer or reputation. This case is distinguishable from Dorsey v. United States, 125 U. S. App. D. C. 355, 372 F. 2d 928 (1967), where the police officers knew of the narcotics records of the defendants and found them under suspicious circumstances, and were held entitled to extend their preventive patrolling mission. Similarly, in Freeman v. United States, 116 U. S. App. D. C. 213, 322 F. 2d 426 (1963), it was held that a cruising police officer had probable cause to arrest the defendant when he was seen with a known narcotics user under suspicious circumstances, and in Washington v. United

States, 130 U. S. App. D. C. 144, 297 F. 2d 705 (1968), probable cause was found for arrest when a defendant, a known narcotics user, was observed while conversing with other known users to receive money from and pass something to one of the group, and then to flee as the officers approached, dropping an envelope containing capsules. It is to be noted that in the Hinton case, the chain of events and circumstances included the fact that the defendant's companion was a known user of narcotics, and requested information on the location of an apartment for which the police had a warrant to search for narcotics.

In the present case both arresting officers testified to having observed at an angle and from a distance of ten to thirteen feet the simultaneous exchange between the two men who were acting suspiciously, involving American currency and a glassine bag which appeared to contain a quantity of white capsules (Pretrial Tr. 15, 26, 30, Tr. 19, 36). At the pretrial hearing one arresting officer admitted that he could not tell from that distance what was in the envelope, while the other, who made the actual arrest, testified that he had been in several arrests that dealt with capsules containing heroin; but when asked what similarity if any between those and the capsules he saw from the cruiser that day, replied that he couldn't tell (Pretrial Tr. 33, 34).

This Court held in Perry v. United States, 118 U. S. App. D. C. 360 (1964) that seeing a suspected narcotics possessor exchange something with a known addict did not alone constitute probable cause for arrest without a warrant. Here the arrest apparently preceded any further observation or examination at closer range of the materials held by the other man, it appearing that appellant was being pursued and had been called on to stop before the other officer announced that the glassine

envelope, then on the sidewalk, contained white capsules (Pretrial Tr. 16, Tr. 19, 20, 30). A search of appellant's person then revealed ten capsules in the pocket of his raincoat, and he was charged with possession of narcotics.

What constitutes the arrest has been considered by the Court, which concluded, in Coleman v. United States, 111 U. S. App. D. C. 210, 295 F. 2d 555 (1961):

"It is sufficient if the person arrested understands that he is in the power of one arresting and submits in consequence."

In Kelley v. United States 111 U. S. App. D. C. 396, 298 F. 2d 310 (1961), an alleged known felon was called by officers to come out of a restaurant, although he had been committing no offense there, even to the extent of loitering. Marijuana cigarettes produced by him on demand by the police that he reveal the contents of his pocket was held unlawfully seized.

In light of the conflicting testimony of the police officers, and the distance of over ten feet, at an angle, from the cruiser, it is questionable that the officers actually saw the capsules before they had made the arrest, and without this, it is submitted that there was no probable cause, under the precedents of this Court, for the arrest and subsequent search which produced the capsules leading to the charges placed against appellant.

#### CONCLUSION

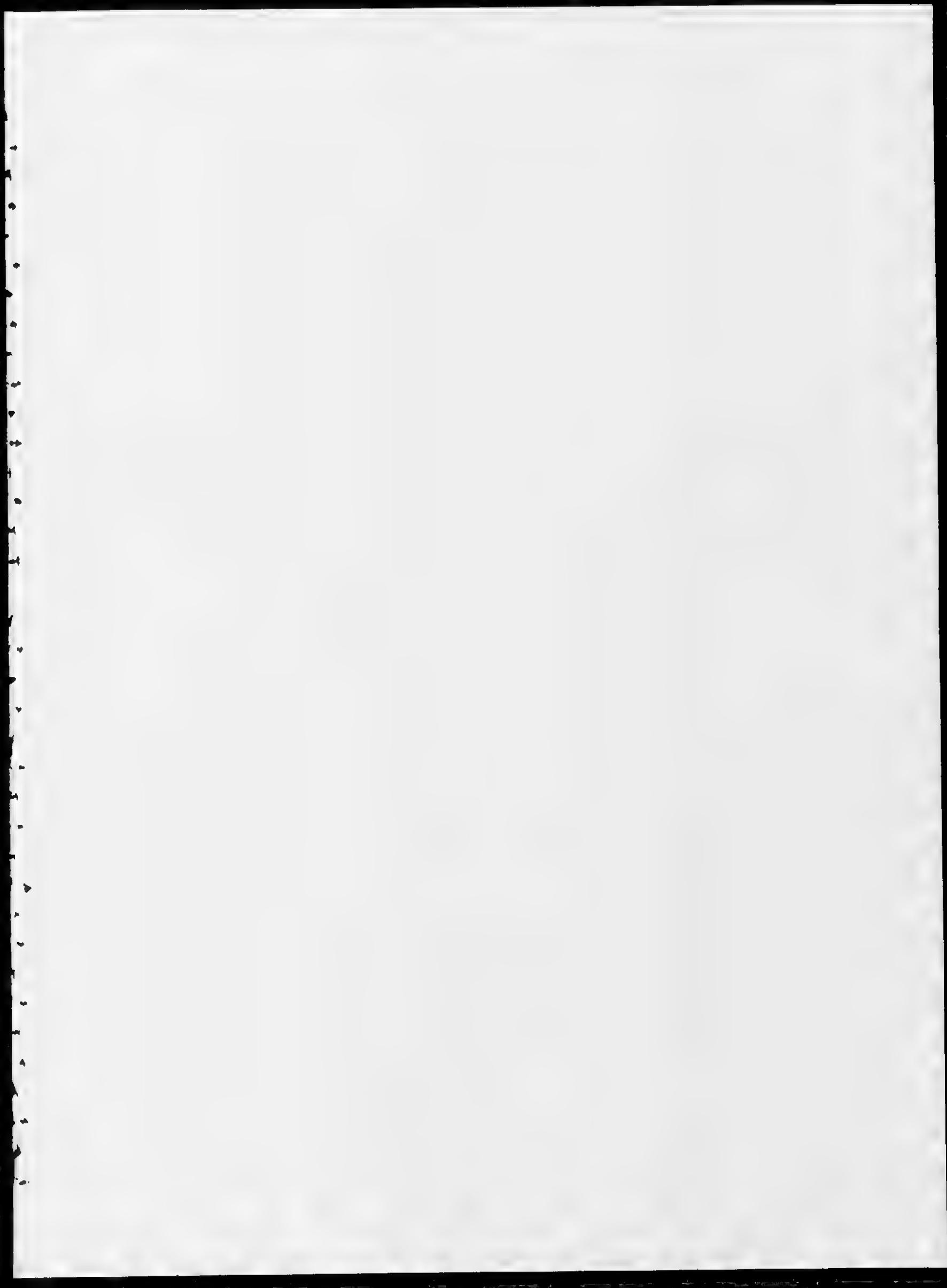
For the reasons stated above, the judgment of the court below should be reversed.

Respectfully submitted,

Of counsel:

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John Kerr Rose  
Attorney for Appellant  
By Appointment



BRIEF FOR APPELLEE

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23,341

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UNITED STATES OF AMERICA, *Appellee*,

v.

ROBERT MILLER, *Appellant*.

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Appeal from the United States District Court  
for the District of Columbia

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THOMAS A. FLANNEY,  
*United States Attorney*.

JOHN A. TERRY,  
EARL J. SILBERT,  
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Cr. No. 1592-68

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\* Cases chiefly relied upon are marked by asterisks.

## **ISSUES PRESENTED \***

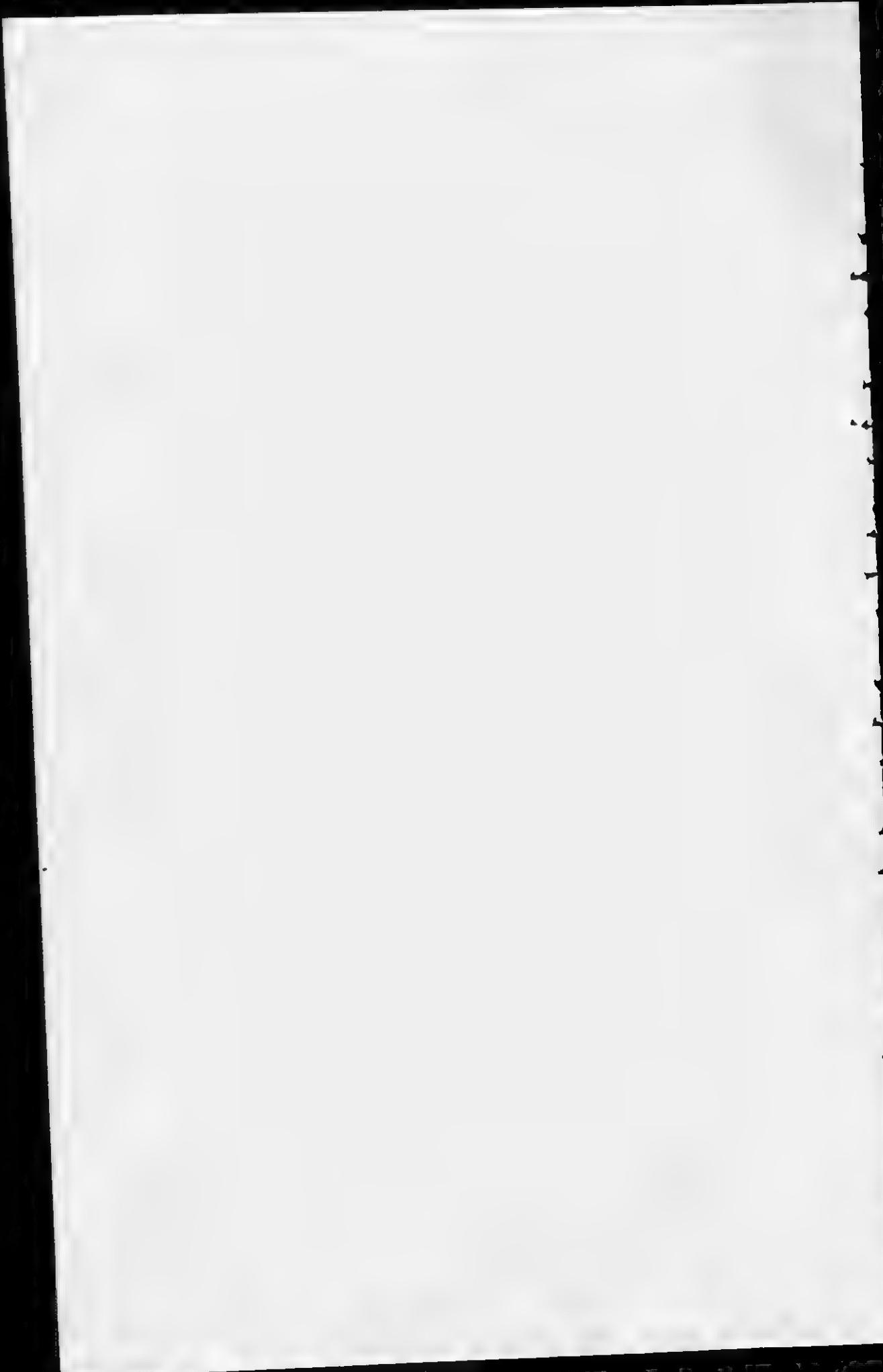
In the opinion of appellee, the following issues are presented:

I. Whether this Court's July 1970 opinion in *Watson v. United States* has applicability to the instant case, tried in April 1969, in which appellant's alleged addiction was not litigated and in which the evidence showed appellant to be trafficking in narcotics?

II. Whether probable cause existed for the arrest of appellant immediately after two police officers witnessed appellant make what appeared to be a narcotics sale?

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\* This case was previously before the Court under the present number on appellant's motion for remand. On September 17, 1970, a motions division of this Court remanded the case to the District Court for reconsideration of the sentence only. The District Court, after further proceedings, directed that the original sentence remain in effect. The case is now before this Court for decision on the merits.



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23,341

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UNITED STATES OF AMERICA, *Appellee*,

v.

ROBERT MILLER, *Appellant*.

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Appeal from the United States District Court  
for the District of Columbia

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## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

By indictment filed October 7, 1968, appellant and one Herbert H. Hammond were indicted together in a four-count indictment—each being charged separately with a violation of 26 U.S.C. § 4704 (a) and 21 U.S.C. § 174. A motion to suppress evidence was heard and denied by District Judge Aubrey E. Robinson, Jr., on March 14, 1969, as to both individuals. When the case was called for trial on April 23, 1969, before Chief District Judge Edward M. Curran, defendant Hammond entered a guilty plea to one count charging violation of 26 U.S.C. § 4704 (a),<sup>1</sup> while appellant proceeded to trial by jury on both counts of the

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<sup>1</sup> After commitment pursuant to Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. § 4252, for examination, and a subsequent determination that defendant Hammond was an addict but not likely to be rehabilitated, he was sentenced to five years' imprisonment.

indictment pertaining to him.<sup>2</sup> On April 24 appellant was found guilty as charged. An information as to a previous narcotics conviction was thereafter filed by the Government,<sup>3</sup> and on June 20, 1969, appellant was sentenced to what was then deemed to be a mandatory term of ten years' imprisonment. This appeal followed.

On July 16, 1970, appellant filed in this Court a "Motion for Remand and for Enlargement," citing *Watson v. United States*, D.C. Cir. No. 21,186, decided July 15, 1970, and requesting "that a hearing be held for the purpose of determining whether such addiction existed at the time of the alleged crime." Appellee filed an answer to that motion, opposing the requested remand for a hearing but suggesting that a remand for reconsideration of the sentence in light of *Watson* would be appropriate. Thereafter a motions division of this Court on September 17, 1970, ordered a remand, "but only to afford an opportunity for reconsideration of the sentence imposed with respect to possible commitment under the Narcotics Addict Rehabilitation Act."

Appellant was thereafter committed by the District Court on November 24, 1970, for examination to determine his eligibility for sentencing under the Narcotic Addict Rehabilitation Act (NARA). By letter of January 28, 1971, the Warden of the Federal Correctional Institution, Danbury, Connecticut, advised the trial judge that, although appellant was an addict, he was not likely to be rehabilitated through the NARA program.<sup>4</sup> Relying upon these representations, appellant was recommitted by the court on Feb-

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<sup>2</sup> After impaneling the jury, the court allowed appellant to relitigate the motion to suppress out of the presence of the jury. (Tr. 17-27), and again the motion was denied (Tr. 27).

<sup>3</sup> This information, undisputed by appellant, revealed his prior plea of guilty on April 10, 1959, to four counts of an indictment charging violations of 26 U.S.C. § 4705 (a), for which he received concurrent sentences of eight years' imprisonment.

<sup>4</sup> The letter advised that appellant did not feel he could receive the help he needed through the program, that he doubted his ability to remain free of drugs, and that he was seeking treatment which would provide him with methadone maintenance and individual therapy.

ruary 10, 1971, to the custody of the Attorney General to continue serving the sentence imposed on June 20, 1969.

The evidence at trial showed that on July 20, 1968, Metropolitan Police Officers David C. Haskins and Cornelius Mahoney were on a routine patrol at approximately 6:00 p.m. in a marked police scout car (Tr. 14, 39). It was daylight, and visibility was excellent (Tr. 34). Proceeding east in the 700 block of N Street, Northwest, their scout car came to a stop at the intersection of 7th and N Streets<sup>6</sup> behind another vehicle in the right-hand lane as they waited for the traffic light to change (Tr. 28-29).

While so stopped Officer Haskins observed two unknown men, later identified as appellant and Herbert H. Hammond, "acting in a very suspicious manner" (Tr. 29) approximately ten to thirteen feet away (Tr. 34, 45). They were hunched up close together, and after looking furtively around, but not toward the police car, appellant was observed by both officers to pass to Hammond a clear cellophane bag "which appeared to have white capsules in it" (Tr. 21, 29, 40). Hammond was observed "almost simultaneously" to hand money to appellant (Tr. 30, 40). Both officers thereupon immediately got out of the car and went toward the two individuals in question. Officer Mahoney seized Hammond while Officer Haskins went towards appellant, who, having then noticed the officers, started moving away (Tr. 19, 30-31, 41). At this time Hammond dropped the cellophane envelope, which was recovered by Officer Mahoney and was found to contain five capsules, each containing white powder (Tr. 41). Informed of this, Officer Haskins, who had asked appellant to stop, then placed him under arrest (Tr. 19-20). A search incident to the arrest

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<sup>6</sup> At the time of the original hearing on the motion to suppress, this area was described by Officer Mahoney, who had previously walked a beat in the 14th and U Streets area and who also had previously been a member of the Morals Division involved in narcotics work, as "one of the heavier areas of the four or five sections of the city where there is quite a bit of narcotic traffic." (Mo. Tr. 19.) Officer Haskins, who also had prior experience with narcotics arrests, testified, "It is one of the higher areas of the city for narcotics traffic." (Mo. Tr. 36.) See also footnote 10, *infra*.

revealed another cellophane bag in appellant's raincoat pocket containing ten more white capsules with powder in them, as well as a cigarette package with six empty gelatin-type capsules and a manila envelope containing a quantity of white powder (Tr. 19-20, 31-33). No tax stamps were observed on any of these items (Tr. 33).

The seized items were turned over to an officer from the Narcotics Squad, who placed them in lock-sealed envelopes and subsequently delivered them to the Internal Revenue Service Laboratories for chemical analysis (Tr. 46-51). The Government's case was concluded with the testimony of IRS Chemist John A. Steele, who testified that his analysis of the powder in question revealed it to be a mixture of heroin hydrochloride, quinine hydrochloride, mannitol and milk sugar (Tr. 51-55).

Appellant chose not to testify, and the defense rested without putting on any evidence (Tr. 56).

#### **ARGUMENT**

**I. Watson v. United States has no applicability to appellant's case.**

(Tr. 19-21, 29-30, 40-41)

In the extended discussion as to whether Congress intended to expose the non-trafficking addict possessor to criminal punishment and whether 26 U.S.C. § 4704 (a) and 21 U.S.C. § 174, as applied to such addicts, are constitutionally invalid in light of *Robinson v. California*, 370 U.S. 660 (1962), this Court stated in *Watson v. United States, supra*, that "for the future" such addicts whose acquisition and possession of narcotics is "solely" for their own use and who wish to defend on such grounds are not at a loss to know how to do so. The Court then went on to state that the primary attack should be by a motion to dismiss, an alternate claim being the constitutional defectiveness of the statutes under *Robinson* as applied to them. *Watson, supra*, slip op. at 21-22. Appellant, now seeking a *Watson*

style defense, but ignoring both the prospective language ("for the future") and the factual prerequisite ("solely for his own use"), nevertheless urges (1) that Congress never intended that possession of narcotics alone on the part of an addict should constitute a crime, and (2) that the statutory provisions in question are unconstitutional under the Fifth and Eighth Amendments to the Constitution.

We submit that the arguments advanced by appellant are simply not ripe for consideration in the instant case, which was tried fifteen months prior to *Watson*. Appellant having failed to litigate this issue at trial, consideration on appeal is now precluded. *Watson v. United States, supra*, slip op. at 23; accord, *Morrison v. United States*, \_\_\_\_ U.S. App. D.C. \_\_\_, 434 F.2d 532 (1970); *United States v. Harrison*, 139 U.S. App. D.C. 266, 432 F.2d 1328 (1970). In the case at bar, moreover, this proposition is already supported by this Court's limited remand for reconsideration of the sentence *only*, notwithstanding appellant's request for remand on the question of his addiction.

There is still a further reason why appellant's contentions are without merit. Appellant has based his entire argument on the premise that he is a non-trafficking addict. Although for present purposes we do not dispute that he may well be an addict, the facts of this case belie any possible allegation that he is a non-trafficking possessor. The testimony at trial shows unequivocally that appellant was caught *in flagrante delicto*—in the very midst of a narcotics sale in which he was in fact the seller.\* In such a factual context, it is absurd for appellant to suggest that he can meet the criteria suggested in *Watson*, even if we were to assume the applicability of the principles discussed in the *Watson* opinion to the case at bar.<sup>†</sup>

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\* Appellant also has a prior history of trafficking. See footnote 3, *supra*.

<sup>†</sup> To the extent that *Kleinbart v. United States*, D.C. Cir. No. 21,408, decided October 9, 1970, might be read to imply that *Watson* applies retroactively, we submit that such an interpretation does not comport with the *Watson* opinion itself. Though the Court in *Watson*, as in *Kleinbart*, remanded

II. The arresting officers clearly had probable cause to arrest and search appellant immediately after seeing him make a narcotics sale.

(Tr. 19-21, 29-30, 39-41)

Appellant also contends that probable cause did not exist for his arrest and the subsequent search of his clothing. To support his contentions, appellant apparently disregards the factual determination made on two different occasions by two separate District Judges and concludes that "it is questionable that the officers actually saw the capsules before they had made the arrest."<sup>8</sup> Without this, he asserts, there was no probable cause. (Brief for Appellant at 12.)

The testimony regarding the incident in question reveals quite clearly that in broad daylight, from a vantage point not more than thirteen feet away, both officers observed appellant and Hammond acting in a very suspicious manner in an area known to both officers as a high density nar-

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for possible resentencing under NARA, it specifically refused to allow Watson to develop a record at the remand hearing for the purpose of making an argument that he could not be prosecuted. *Watson*, *supra*, slip op. at 23. This indicates quite strongly that the considerations discussed in *Watson* are to be reserved in the main for new cases on proper records, and that the result reached in *Kleinbart* is merely an exception made for the "somewhat unusual circumstances" of that case. Kleinbart had argued in the trial court that, as an addict possessing narcotics only for his own use, the mandatory minimum sentencing provisions could not constitutionally be applied to him. Since *Watson*, which was decided after he made this argument in the District Court, had predicted that such a factual predicate might be grounds for taking such a person outside the ambit of the federal narcotics statutes altogether, this Court reasoned that a decision on the constitutionality of the sentencing provisions would affect only Kleinbart. Slip op. at 5-7.

<sup>8</sup> As the prosecutor stated to the court at the original hearing prior to the court's ruling:

Ten to thirteen feet is less distance than separates you from me at this particular time, and if I had a two by three glassine envelope in my hand, I have no doubt that you could see it. And likewise, if I had it, I could see it without any difficulty, and I could also see white capsules of that kind. (Mo. Tr. 40-41.)

\* Such an argument seems to concede that if the officers' testimony is to be believed—and there was no evidence to the contrary—probable cause did in fact exist.

cotics section.<sup>10</sup> Additionally, both officers, each of whom possessed prior narcotics experience, thereafter observed appellant transfer to Hammond a clear cellophane envelope that appeared to the officers to contain capsules, receiving almost simultaneously a quantity of money in exchange.

On the issue of probable cause the question to be answered is whether the officer "in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson v. United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962). When the facts of this case are viewed in such light, the conclusion is inescapable that the officers clearly had probable cause—if not proof positive—to believe that a felony (i.e., a narcotics sale) was taking place in their very presence.

Appellant seeks to find support for his position by pointing to narcotics cases in which probable cause has been established in part by the factor that the individual there involved had previous known narcotics involvements.<sup>11</sup> Yet, as this Court stated in *Hinton v. United States*, 137 U.S. App. D.C. 388, 391, 424 F.2d 876, 879 (1969), the elements of a finding of probable cause are as varied as encounters between citizens and police, and "seldom does a decision in one case handily dispose of the next." Surely an absence of prior knowledge of narcotics involvement as to either individual could in no way be deemed dispositive in the factual context of this case. Failure of these officers to respond to the situation that confronted them would certainly have been a dereliction of duty.

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<sup>10</sup> This Court has noticed on other occasions the significance of a nearby area (14th and U Streets) in determining probable cause. *Dorsey v. United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); *Freeman v. United States*, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963).

<sup>11</sup> *Washington v. United States*, 130 U.S. App. D.C. 144, 397 F.2d 705 (1968); *Dorsey v. United States*, *supra* note 10; *Freeman v. United States*, *supra* note 10.

**CONCLUSION**

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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No. 23,341

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT MILLER,

Appellant.

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APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF COLUMBIA

REPLY  
BRIEF FOR APPELLANT

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United States Court of Appeals  
for the District of Columbia Circuit

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FILED MAY 14 1971

*Nathan J. Paulson*  
CLERK

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,341

Criminal 1582-68

UNITED STATES OF AMERICA,  
Appellee,

v.

ROBERT MILLER,  
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Counsel for appellant file this brief in response to two legal issues raised by appellee in its brief.

First, appellee argues that since this case was tried before Watson, and no Constitutional issue raised at trial, appellant is in no position to have the Constitutional question raised in his case. There is no reason to suppose that a serious Constitutional infirmity such as a violation of the Eighth Amendment should not have a retroactive effect to the limited extent that it applies to cases coming up through the courts on appeal from the original trial, such as this one.

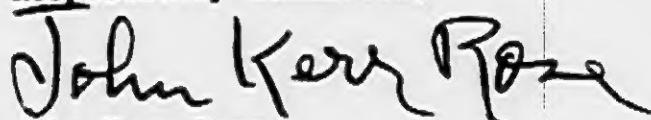
The United States Supreme Court has held in recent years that serious Constitutional issues may be raised for the first time on appeal. Lucas v. Forty Fourth General Assembly of State of Colorado, 377 U.S. 713 (1964), Glidden Co. v. Zdanok, 370 U.S. 530 (1962). See also the decision of this Court in Founding Church of Scientology of Washington, D. C. v. United States, 133 U.S.App.D.C. 229, 409 F. 2d 1146 (1969), and Morgan v.

v. Pilliiod, 299 F. 2d 217 (C.A. 5, 1962).

Here we have a case where there has been a determination on remand by the authorities charged with the administration of the Narcotic Addict Rehabilitation Act of 1966 that appellant is an addict, that he is a subject for rehabilitation, and that the facilities available under that Act, particularly methadone, are not available at their institution. This raises directly the issue of whether an addict in appellant's position should spend ten years in prison mandatorily, where the charge is not trafficking, but simply possession of ten capsules, hardly enough for his own needs for a day.

The Court chose not to refer the legal issues for argument before the court below, and in fact, with the recent decision of the District of Columbia Court of Appeals, not yet reported, and all that has been written on this very important subject, there appears to be no reason why the Court should not utilize this opportunity, where there is the important record on remand with respect to the addiction and inability to afford assistance under the NARA, to resolve the serious Constitutional issue presented. See Easter v. District of Columbia, 124 U.S.App.D.C. 33, 361 F. 2d 60 (1966), and Kleinbart v. United States, No. 21408, decided October 9, 1970.

Respectfully submitted,



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